

ARKANSAS COURT OF APPEALS

DIVISION I
No. CA08-411

CHRISTON R. JENKINS and
AMANDA S. JENKINS
APPELLANTS

V.

WILLIAM R. YODER and
MARGARET C. YODER
APPELLEES

Opinion Delivered November 5, 2008

APPEAL FROM THE PULASKI
COUNTY CIRCUIT COURT,
[NO. CV-05-6302-13]

HONORABLE COLLINS KILGORE,
JUDGE

AFFIRMED

LARRY D. VAUGHT, Judge

Appellants Amanda and Chris Jenkins brought this action against appellees Margaret and William Yoder, alleging that the Yoders committed fraud in connection with the sale of their home. Following a bench trial, the Pulaski County Circuit Court entered an order and judgment, finding in favor of the Yoders. On appeal, the Jenkinses argue that the trial court’s findings are clearly erroneous and that they are entitled to rescission of their real estate contract with the Yoders. We affirm.

In 1992, the Yoders bought a home located on Sandstone Court in Little Rock, Arkansas. The two-story home, including a basement, was owned by Helen Johnson Adkins, who built the house in 1973. The Yoders had the home inspected by Robert Wortsmith, who discovered that “the rear block wall of the garage [was] cracked its entire horizontal length and [was] bulging into the garage—the fill against this wall [seemed] to be pushing it

into the garage.” As a condition to their purchase, the Yoders required Adkins to repair the wall. Adkins paid \$5000 to Arkansas House Levelers to excavate the dirt against the wall, install french drains, attach angle irons to the interior and exterior of the wall, and waterproof the wall.

In 2000, while the Yoders were living in the home, an ice storm damaged the roof. The Yoders filed an insurance claim and the insurance company gave them money to make repairs. The Yoders elected to replace the entire roof in September 2002.

In 2003, the Yoders listed the home with realtors, The Janet Jones Company, and in March of 2003, they filled out a disclosure statement, which included a section entitled “Purpose of Statement”:

This is a statement of conditions and information concerning the Property. Unless otherwise advised, the Seller does not possess any expertise in construction, architecture, engineering or any other specific areas related to the construction or condition of improvements on the Property or the Property itself, other than occupying or having ownership of the Property. The Seller possesses no greater knowledge than that which could be obtained by inspection of the Property by potential buyers, lessees, tenants or their representatives. This statement is not a warranty of any kind by the Seller, Listing Agent Firm or any subagent of Listing Agent Firm. **THIS DISCLOSURE IS NOT A SUBSTITUTE FOR INSPECTIONS. ANY POTENTIAL PURCHASER OF THE PROPERTY IS ENCOURAGED TO OBTAIN A PROFESSIONAL, PERSONAL OR OTHER INSPECTION PRIOR TO PURCHASING, LEASING, EXCHANGING, RENTING OR OFFERING TO PURCHASE THE PROPERTY.**

When the listing agreement with the Janet Jones Company expired, with no offers, the Yoders listed the home with Adkins, McNeill, Smith & Associates. The Yoders filled out a second, identical disclosure statement in July 2003.

In August 2003, the Jenkinses made an offer to purchase the Yoders’ home for

\$273,000. The Jenkinses were given the second disclosure statement. The Jenkinses personally inspected the home six times and had the home professionally inspected by Alen Williams. None of these inspections uncovered the prior repair work performed on the garage wall.

The Jenkinses closed on the home in September 2003. In the fall of 2004, after unusually heavy rains, the Jenkinses' basement flooded on several occasions. Investigating the source of the water, Chris Jenkins removed paneling from the east wall of the basement and discovered rotted wood and other signs of water intrusion. He also observed that new studs had been installed and that the wall had been extended about four inches from the original basement wall. Later, the Jenkinses learned of the repairs to the garage wall made by Adkins in 1992.

The Jenkinses filed suit against the Yoders, seeking rescission of the real estate contract and alleging that the Yoders made material misrepresentations on the disclosure statement in an effort to conceal the water problems in the home. The Jenkinses challenge the Yoders' answers to the following disclosure-statement questions:

4. Are there room additions, structural modification or other alterations or repairs made to the Property since the Property was originally constructed?
7. Has there been any settling from any cause, or slippage, sliding or other poor soil conditions at the Property or to adjacent properties?
8. Has there been flooding, drainage, grading problems, or has water ever stood on the Property or under any improvement constructed thereon?
9. Has there been any damage to the Property or any of the structures from fire, earthquake, storms floods or landslides prior to or during your ownership?
21. Has there ever been a problem with the roof of any of the improvements on the Property, such as defective shingles, damaged shingles, leaking or otherwise, or have you become aware of possible problems with the roof of any of the improvements on the Property that may occur in the future?
24. Have you ever filed or made an insurance claim, warranty claim, or other claim concerning the Property?
47. Is there or has there ever been any past or present water intrusion?

On the first disclosure statement, the Yoders answered “no” to questions 4, 7, 8, 9, and 21 and “yes” to questions 24 and 47. On the second statement, the Yoders answered “no” to all of the questions.

The Jenkinses testified that they relied on the Yoders’ answers to their detriment. They testified that if the disclosure statement had informed them of the work that was performed on the wall of the garage in 1992, they would not have purchased the home.

The Yoders testified that they did not intend to misrepresent the condition of the home to the Jenkinses. Regarding their answers to questions 4, 7, 8, and 9, they testified that they thought that their answers were truthful. They considered the work performed on the garage wall in 1992 to be preventative work—not a structural modification. They were not aware of settling of soil, drainage, flooding, or grading problems. They never experienced any water intrusion in the basement of the home. They also testified that they did not purposefully conceal any areas where work was performed on the garage wall in 1992, or where the new damage was discovered in 2004, and that the exterior angle irons were always visible. They denied making any other repairs in the basement walls. As for questions 21 and 24, the Yoders conceded that they answered questions 21 and 24 incorrectly. They gave no explanation as to why they gave inconsistent answers to question 47.

The Yoders’ inspector, Wortsmith, testified that he did not consider the problem that he uncovered in 1992 to be a structural defect. He testified that the work performed to remedy that problem was preventative and that the structure of the home (prior to and after the repair) was sound. Adkins, who lived in the home for almost twenty years, testified that she never experienced any water intrusion.

General contractor John Shaw testified that he inspected the Jenkinses' home and discovered rotted wood and other evidence of moisture behind a paneled wall in the basement. He also noted that the wall was bulging, which was evidence that the foundation had moved. He observed evidence that repairs had been made to the wall, because it was protruding into the room a few inches and there were new studs in the wall; however, he stated that he was not able to ascertain when those repairs were made.

Alen Williams was the inspector hired by the Jenkinses in September 2003. His inspection did not reveal the work performed on the home in 1992. He did not note any water-intrusion problems in the home. He testified that he could not have seen the angle irons in the garage because they were covered by pegboard, which William Yoder testified he installed in 1993. Williams did not observe the angle irons on the back of the home.

General contractor Jerry Johnson inspected the Jenkinses' home in September 2006. He confirmed that there was a crack in the wall of the basement and that the wall was moving inward. He concluded that soil and water pressure dislocated the wall and that water had flowed through the crack. He testified that the extensive damage to the basement wall occurred over a period of years. Finally, he estimated that it would cost approximately \$80,000 to repair the water-intrusion problem in the basement.

Realtor Jeff Juel of McKay & Company Real Estate was the Jenkinses' agent. He testified that he and the Jenkinses visited the Yoder home six times. Juel testified that he did not observe the angle irons on the back of the home.

The trial court entered an order and judgment in favor of the Yoders, finding that the Jenkinses failed to prove by clear and convincing evidence that the Yoders committed fraud

in connection with the sale of their home. On appeal, the Jenkinses argue that the trial court's findings were clearly erroneous.

The standard of review for equity cases is *de novo*, but we will not reverse the trial court's findings of fact unless the findings are clearly erroneous. *Beatty v. Haggard*, 87 Ark. App. 75, 184 S.W.3d 479 (2004). A finding is clearly erroneous when we are left with the definite and firm conviction that a mistake has been made, even if there is evidence to support the finding. *Id.* In reviewing the trial court's findings of fact, we give due deference to the trial judge's superior position to determine the credibility of witnesses and the weight to be accorded their testimony. *Holaday v. Fraker*, 323 Ark. 522, 920 S.W.2d 4 (1996).

For a plaintiff to prevail on a fraud claim, he must prove the following elements:

1. A false representation of material fact;
2. Knowledge that the representation is false or that there is insufficient evidence upon which to make the representation;
3. Intent to induce action or inaction in reliance upon the representation;
4. Justifiable reliance on the representation;
5. Damage suffered as a result of the reliance.

Beatty, 87 Ark. App. at 84, 184 S.W.3d at 485. Parties seeking rescission must prove a fraud claim by clear and convincing evidence because they seek "to overturn a solemn written instrument by proof which alters the written terms of the contract." *Riley v. Hoisington*, 80 Ark. App. 346, 352, 90 S.W.3d 743, 747 (2003).

In cases where our court has held that a party proved their cause for rescission of a real estate contract based on fraudulent misrepresentation, the facts clearly and convincingly established that, at the time of the sale, the seller knew or should have known of the defect, tried to repair/conceal it, and failed to disclose it on the disclosure statement. *See Beatty, supra*

(holding that the trial court clearly erred in finding that the buyers failed to establish a cause for rescission of a real estate contract based on fraud, where the sellers testified that they noticed signs of settling prior to the sale, poured concrete as a preventative/cosmetic measure, and failed to disclose this fact to the buyers in the disclosure statement); *Riley, supra* (affirming the trial court's finding of fraud sufficient to warrant rescission of the real estate contract, where the seller testified that the house flooded twice when he lived there, he made repairs following each incident, and he failed to reveal this information in the disclosure statement). Based upon *Beatty* and *Riley*, we hold that the trial court in the case at bar was not clearly erroneous in finding that the Jenkinses failed to prove their cause for fraud as the facts failed to clearly and convincingly establish that, at the time of the sale, the Yoders knew or should have known of the water problem, tried to repair/conceal it, and failed to disclose it on the disclosure statement.

Question 4

The crux of this case involves the Yoders' answer to question 4—whether there had been structural modifications or repairs. The trial court found that the Yoders' answer to this question was false; however, it found that the Jenkinses failed to prove that the Yoders knew at the time of the sale that the representation was false. We agree. The defect that the Jenkinses complain of is located in the basement wall. There is no evidence in the record establishing that the Yoders knew or should have known that damage to the basement wall existed.

Adkins and the Yoders testified that they never had any water problems in the basement. Wortsmith did not see any cracks in the walls of the basement in 1992. The

Jenkinses' inspector did not find evidence of water intrusion in the basement in 2003. Chris Jenkins observed no cracks in the basement walls in 2003. In September 2003, contractor Shaw did not observe any evidence of water intrusion in the basement or in the garage. When the carpet was removed from the basement in September 2003, there was no evidence of water intrusion.

While contractor Johnson testified "I would say that the problem noted by Mr. Wortsmith has now exhibited itself in the basement [wall]," this is not clear and convincing proof that the crack found in the basement in 2004 was the same crack that was found in the garage in 1992. And while inferences were drawn about repairs made to the basement wall (testimony about new studs and the extended wall), there was no clear and convincing evidence tying those repairs to the Yoders.

Assuming there was sufficient proof that the Yoders' response to question 4 was knowingly false, there is a lack of proof that the Jenkinses justifiably relied on the misrepresentation. The evidence established that there were at least three large angle irons on the exterior of the home at the time of the sale. This put the Jenkinses on notice of the 1992 repair. While there was testimony that the angle irons may have been covered by foliage as the Jenkinses, Juel, and the Jenkinses' inspector did not see them during their inspections, this is not clear and convincing evidence that the Yoders were concealing them. To the contrary, the evidence showed that the Jenkinses were given free access to the house by the Yoders on six occasions. Further, the Jenkinses' inspector testified that even if he had seen the angle irons, if there were no cracks in the wall, he would not have mentioned it in his report. Therefore, because the proof was lacking on the allegation that the Yoders concealed the

angle irons, and there is no dispute that they were in place at the time of the sale, the Jenkinses were on notice of the repair. Because the element of justifiable reliance is not satisfied, we hold that the trial court did not clearly err in finding that the Jenkinses failed to prove fraud with regard to question 4.

Questions 7, 8, and 9

The trial court found that the Yoders' answers to questions 7, 8, and 9 were not false. We agree. At the time of the sale, there was no evidence of settling, slippage, or sliding of soil. The testimony of home inspector Wortsmith was that he would have answered "no" to the question about settling, slippage, or sliding of soil. As per the "Purpose of Statement" set forth in the disclosure, the Yoders are not experts in "construction, architecture, engineering or any other specific areas related to the construction or condition of improvements" of the home. Certainly, the Yoders are not to be held to be more knowledgeable on this issue than the expert inspector.

As for the question about flooding or other water problems in or about the house, there was no evidence demonstrating that the Yoders' negative response to this question was false. Adkins and the Yoders testified that they never experienced any water problems in the house prior to the 2003 sale. In September 2003, when the carpet was removed from the basement, there was no evidence of water intrusion. Finally, there was no testimony that the house had experienced damage due to fire, earthquakes, storms, floods, or landslides.

Questions 21 and 24

The trial court found that the Yoders' answers to questions 21 and 24, regarding the roof and the filing of insurance claims, were knowingly false. The Yoders admitted this at

trial. However, the trial court also found that the Jenkinses failed to prove that they justifiably relied on these misrepresentations. We agree. The evidence demonstrated that the Jenkinses knew a new roof had recently been installed and did not make any inquiry as to why. The evidence further demonstrated that the Jenkinses were not damaged by these false representations. The Jenkinses' home inspector found no defects in the roof in 2003. The current roof problems, according to Amanda Jenkins, were new and caused by squirrels. Most importantly, the Yoders' false answers to questions about the roof and insurance had no relation to the water-intrusion problem in the basement.

Question 47

The Yoders gave inconsistent answers to question 47, which inquired about past or present water intrusion. In its order, the trial court made no findings regarding question 47. A ruling by the trial court is a prerequisite to our review of an issue. *Kralicek v. Chaffey*, 67 Ark. App. 273, 998 S.W.2d 765 (1999). Therefore, we need not address this point on appeal.

In conclusion, we hold that the trial court did not clearly err in finding that the Jenkinses failed to establish, by clear and convincing evidence, that the Yoders committed fraud in connection with the sale of their home.

Affirmed.

GLADWIN and HUNT, JJ., agree.